

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

VICTOR HOLMES,

Petitioner

vs.

DIRECTOR NEVADA DEPARTMENT  
OF CORRECTIONS, et al.

Respondents.

Case No. 2:15-cv-01445-JAD-NJK

**Order Referring Action to the Court of  
Appeals under Circuit Rule 22-3(a) for  
Authorization, Granting IFP Application,  
Denying Motion for Appointment of Counsel,  
and Administratively Closing Case**

[ECF 4, 5]

By this petition, Victor Holmes challenges the validity of the judgment of conviction in the Eighth Judicial District Court of the State of Nevada in *State v. Holmes*, Case No. 02C184507-2. Petitioner challenged the same judgment of conviction in this court in *Holmes v. Smith*, Case No. 3:09-cv-00337-LRH-RAM. The court dismissed that action under 28 U.S.C. § 2244(d) because it was untimely, and the court denied a certificate of appealability.<sup>1</sup> Petitioner appealed, and the court of appeals denied a certificate of appealability.<sup>2</sup>

**A. Petitioner Must Obtain Permission from the Court of Appeals before Proceeding with this Petition.**

When a section 2254 habeas petition is dismissed as untimely, as petitioner's 2009 petition was, a subsequent petition is considered "second or successive for purposes of . . . 28 U.S.C. § 2244(b)." *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009). Typically, "dismissal of a first habeas petition for untimeliness presents a 'permanent and incurable' bar to federal review of the underlying claims." *Id.* Before the district court can consider a second or successive petition, a petitioner must first obtain authorization to proceed from the court of appeals. 28 U.S.C. § 2244(b)(3); Ninth Circuit Rule 22-3. Because it does not appear that petitioner has sought or obtained that permission before filing this action, the court now refers this case to the Ninth Circuit

<sup>1</sup> ECF 3, 6, 11 in case 09-cv-337-LRH-RAM.

<sup>2</sup> ECF 12 in case 09-cv-337-LRH-RAM.

1 Court of Appeals and administratively closes this action while petitioner seeks permission under 28  
2 U.S.C. § 2244(b)(2) and Circuit Rule 22-3(a) to pursue this action.

3 **B. Petitioner is granted *in forma pauperis* status.**

4 Petitioner has filed an application to proceed *in forma pauperis*.<sup>3</sup> The court finds that  
5 petitioner is unable to pay the filing fee and grants the motion. Petitioner will not be required to pay  
6 the \$5 filing fee.

7 **C. The request for counsel is denied.**

8 Petitioner has also moved for appointment of counsel.<sup>4</sup> The court denies this motion without  
9 prejudice at this time because the court is referring this petition to the court of appeals under Circuit  
10 Rule 22-3(a).

11 **Order**

12 IT IS THEREFORE ORDERED that the application to proceed *in forma pauperis* [ECF 4]  
13 is **GRANTED**. Petitioner need not pay the filing fee of \$5.00.

14 IT IS FURTHER ORDERED that the motion for appointment of counsel [ECF 5] is  
15 **DENIED**.

16 The clerk of the court is directed to **file the petition** for a writ of habeas corpus in  
17 accordance with 28 U.S.C. § 2254, **add Adam Paul Laxalt**, Attorney General for the State of  
18 Nevada, as counsel for respondents and **electronically serve respondents** with a copy of the  
19 petition and a copy of this order. No response by respondents is necessary.

20 The Clerk of the Court is further directed to **refer this action to the United States Court of**  
21 **Appeals for the Ninth Circuit under Circuit Rule 22-3(a)** and administratively **close this action**.

22 DATED: October 30, 2015

23  
24   
25 JENNIFER A. DORSEY  
26 United States District Judge

27 <sup>3</sup> ECF 4.

28 <sup>4</sup> ECF 5.